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No. 847

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

LAURA BETH MOODY,
Petitioner,

vs.

MORRIS KAGAN, ET AL.,
Respondents.

Petition For A Writ Of Certiorari To The Court Of Civil Appeals For The First Supreme Judicial District Of Texas, At Houston

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Petitioner Laura Beth Moody prays that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the First Supreme Judicial District of Texas, at Houston, entered in the above entitled cause on January 16, 1958, wherein said Court instructed the trial court to enter judgment specifically enforcing the hereinafter described contract for the sale of realty against said Petitioner.

Citation to Opinions Below

The original opinion of the Court of Civil Appeals and its opinion upon motion for rehearing, printed in Appendix A and B hereto, are reported in 309 S. W. (2d) 515.

Jurisdiction

The judgment of the Court of Civil Appeals of which review is here sought, is printed in Appendix C hereto and was rendered on January 16, 1958.

The Supreme Court of Texas refused to review said judgment on writ of error and, on June 11, 1958, overruled Petitioner's motion for rehearing of her application for writ of error. The orders of the Supreme Court of Texas are printed in Appendix D hereto.

Under numerous decisions of this Court, the most recent of which is *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157 at 160, when the Supreme Court of Texas refuses an application for writ of error, as it has done in the case at bar, this Court's writ of certiorari is directed to the intermediate appellate court—to a Court of Civil Appeals—and the time for filing a petition for such writ is computed from the date when the Supreme Court of Texas overrules the motion for rehearing of the application for writ of error, which, in the instant case, was June 11, 1958.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257(3), since Petitioner claims a right and title under the due process clause of the

Fourteenth Amendment to the Constitution of the United States and since the Texas courts applied a Texas statute in such manner as to deprive Petitioner of such right and title.

The Federal Question

Petitioner is asserting herein that, by ordering specific performance of a contract for the sale of realty, the Texas courts have deprived her of her right and title to such realty in contravention of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The trial court held with Petitioner and denied specific performance of the contract. Consequently, there was no need or occasion for Petitioner to assert any federally-protected right or title before that court, and Petitioner did not do so.

The deprivation of such right and title first occurred when the Houston Court of Civil Appeals, relying upon a Texas statute, decreed specific performance of the contract of sale and thereby divested Petitioner of her right and title to the realty in question. The deprivation was sanctioned when the Supreme Court of Texas refused to grant a writ of error to review the judgment of the Houston Court. In her motion for rehearing before the Houston Court, in her application for writ of error to the Supreme Court of Texas, and in her motion for rehearing of said application, Petitioner Laura Beth Moody made complaints to the Texas courts because of such deprivation.

Nowhere in any of these complaints did Petitioner make explicit reference to the due process clause of the Fourteenth Amendment to the Constitution of the United States. However, in all instruments which she filed in the Texas courts subsequent to the rendition of the opinion of the Houston Court of Civil Appeals, Petitioner strenuously contended that the Texas courts had stripped her of her right and title to the property in question without any lawful basis for so doing. Hence, it is respectfully submitted that the instant situation falls within decisions such as *New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63 at 67 and *Braniff Airways v. Nebraska State Board*, 347 U. S. 590 at 598-599. In the latter case, as in the case at bar, the complaining party did not specifically point to the due process clause of the Fourteenth Amendment but this Court held:

> "However, appellant timely raised and preserved its contention that its property was not taxable because such property had attained no taxable situs in Nebraska. Though inexplicit, we consider the due process issue within the clear intendment of such contention and hold such issue sufficiently presented."

Similarly, in the instant case, although Petitioner did not explicitly claim the protection of the Fourteenth Amendment, she timely and consistently contended that the courts of Texas had no right to deprive her of her property and, "though inexplicit," it is submitted that the due process issue was, in the words of this Court, within the clear intendment of such contention and was sufficiently presented.

Question Presented

Whether the courts of the state, in reliance upon and by application of a state statute, can deprive a owner of the entire equitable interest in property of such interest by granting specific performance of a contract for sale of such property under circumstances in which the purchasers contracted, not with said owner of the equitable interest, but with a person who held only a naked legal title to such property in trust for said owner of the equitable interest, and in which said purchasers knew of the existence of such trust and of the owner of the beneficial interest therein at the time of the execution of the contract of sale and either knew or should have known that the trustee with whom they contracted did not have the right to sell the property without the joinder of the owner of the equitable interest or her agent?

Statutes Involved

The statutes involved, Articles 7425a and 7425b-8 Vernon's Annotated Civil Statutes of Texas are identical in language—a fact which is immaterial herein—and read as follows:

> "When a trust is created, but is not contained or declared in the conveyance to the trustee, or when a conveyance or transfer is made to a trustee without disclosing the names of the beneficiary, or beneficiaries, the trustee shall be held to have the power to convey or transfer or encumber the title and whenever he shall execute and deliver a conveyance or transfer or en-

cumbrance of such property, as trustee, such conveyance or transfer or encumbrance shall not thereafter be questioned by any one claiming as a beneficiary under such trust or by any one claiming by, through, or under an undisclosed beneficiary, provided that none of the trust property in the hands of said trustee shall be liable for personal obligations of said trustee."

Statement of the Case

This suit was instituted by Respondents against the Petitioner Laura Beth Moody and her Mother, Elizabeth Moody, to compel specific performance of a written contract of sale of certain real estate entered into on June 29, 1954, between Respondents as purchasers and Elizabeth Mody "individually and as Trustee and attorney-in fact for Laura Beth Moody" (Tr. 1).

It will be noticed that, although Petitioner Laura Beth Moody was made a party to this suit, she did not personally sign the contract of sale, and it is undisputed that she never ratified such contract. At the time of the negotiations leading up to the execution of the contract, and at the time of such execution, Petitioner Laura Beth Moody was in Spain (S. F. 181); and, upon learning of the execution of the contract, Petitioner immediately repudiated it (S. F. 182).

The real estate in question was a tract of approximately 1,000 acres which was owned by the Petitioner Laura Beth Moody; which had been a gift from General Sam Houston to Petitioner's great-

grandfather; and which had been in Petitioner's family for more than a century (S. F. 213).

Prior to the execution of the contract in question, Petitioner had done four things affecting, or which might have affected, such property:

1. She had given her Mother, Elizabeth Moody, a power of attorney which, if it was effective and if it is construed by itself, was sufficiently broad to authorize Elizabeth Moody to sell or encumber the property (S. F. 30).

2. She had conveyed the property to Elizabeth Moody by a deed which, in eleven different places, made specific references to the fact that Elizabeth Moody held the property only as trustee; that as trustee she took the property subject to "the various duties and responsibilities defined in that certain Creation of Trust and Trust Agreement of even date herewith, between said Laura Beth Moody, as Grantor, and Mrs. Elizabeth Moody, as Trustee, reference here being made to said Creation of Trust and Trust Agreement for all purposes"; and that Elizabeth Moody was to have and to hold the property "in trust for the purpose and subject to all of the various terms and provisions specified in said Creation of Trust Agreement of even date herewith, to which reference has hereinabove been made" (S. F. 34).

3. Petitioner had executed the Trust Agreement referred to in the aforementioned deed (S. F. 123).

4. On the same day that she executed the Trust Agreement, Petitioner had executed a so-called codicil thereto which provided that any transaction,

lease, sale or agreement of any kind affecting the trust property and involving more than $5,000 or five years duration should "be declared illegal and null and void" if not co-signed by the Petitioner Laura Beth Agent or an agent named by her (S. F. 146).*

Petitioner, Respondents, and the courts below are in agreement that this case should be decided in light of the foregoing four acts by Petitioner. The disagreements giving rise to this petition center around the questions of which of the four acts are material herein and of what significance shall be attributed to those acts which are material. In the interest of clarity, brief mention will be made of those questions before attention is focused upon the basic reasons why a writ of certiorari should be granted herein. The trial court resolved the questions in favor of Petitioner; the Houston Court did not.

The Materiality of Petitioner's Acts and Their Significance

1. Contrary to observations which the Houston Court of Civil Appeals inserted near the end of its opinion — an insertion seemingly made with knowledge that the holding which it previously had expounded might be defective—the power of attorney executed by Petitioner has no relevance in this case. Such power was granted prior to the conveyance of

* The sale in question clearly fell within the terms of this codicil, for it was an outright sale for a consideration of $125,000 (S. F. 17).

the property in trust to Elizabeth Moody; and, under the holding of this Honorable Court in *Love v. Simm's Lessee*, 9 Wheat 515, 6 L. Ed. 149, and like holdings by the Texas Courts, *Donnan v. Adams*, 71 S. W. 580 (refused), *Hollingsworth v. Young County*, 91 S. W. 1094 (refused), *Merrill v. Bradley*, 121 S. W. 561, the subsequent conveyance revoked the power of attorney. It is undisputed that Respondents had actual notice both of the power of attorney and of the subsequnt conveyance. As a result, it is clear that, as held by the trial court, the power of attorny has no importance herein.

4. The Houston Court held that the so-called codicil limiting Elizabeth Moody's power to sell trust property to sales involving $5,000 or less without the joinder of Petitioner or her agent was not binding and effective insofar as the $125,000 sale of the property in question was concerned. It is Petitioner's contention that, far from being ineffective, the codicil was fully operative and rendered null and void the $125,000 sale which Elizabeth Moody, and she alone, attmepted to make.

This leaves items 2 and 3—the deed in trust and the Trust Agreement. The Houston Court devoted virtually all of its opinion to these items and held that, by virtue of Articles 7425a and 7425b-8 V.A.C.S., supra, Petitioner's admitted execution of the deed in trust and of the Trust Agreement, permitted Elizabeth Moody—the holder of only a bare legal title in trust—and only she, to convey both the legal and equitable title to such property, and author-

ized and required the courts to enforce a contract for such conveyance by a decree of specific performance.

Thus, the sequence of events surrounding the contract of sale executed solely by Elizabeth Moody was as follows: At the time of the execution of the contract and of the negotiations leading up to its execution, Petitioner Laura Beth Moody was thousands of miles distant in Spain. Her power of attorney had been revoked by the subsequent conveyance in trust to Elizabeth Moody. She had not authorized the execution of the contract; indeed, in the codicil to the Trust Agreement, she had expressly provided that any such transaction would be "illegal and null and void." Thus, Petitioner Laura Beth Moody neither executed the contract nor authorized its execution upon her behalf.

At the time of the execution of the contract, Respondents knew of the conveyance in trust which had been made subsequent to the granting of the power of attorney; they were informed at eleven places in the conveyance in trust that Elizabeth Moody held the property only as a trustee under a concurrently executed Trust Agreement; both the Respondents and the Houston Court of Civil Appeals admit that at such time Respondents also knew that Petitioner Laura Beth Moody was the beneficiary under the Trust Agreement and that Elizabeth Moody was holding legal title to the property solely as trustee for Petitioner. Necessarily, Respondents also knew that Petitioner did not personally execute the contract of sale, and it is admitted that they made no attempt to examine the terms of the Trust Agreement to ascertain to what extent—if at all—Elizabeth

Moody, as trustee, was authorized to make such a sale. Rather, they sought and secured a contract signed only by Elizabeth Moody.

As soon as Petitioner learned of the contract, she immediately repudiated it (S. F. 182) and refused to sign a deed conveying the land pursuant to the terms of the contract (S. F. 183).

Thus, Petitioner Laura Beth Moody did not sign the contract. She did not authorize its execution on her behalf for she revoked the power of attorney and limited Elizabeth Moody's powers under the Trust Agreement. Finally, she did not ratify the contract and, on the contrary, she repudiated it as soon as it was brought to her attention.

Notwithstanding these facts, the Houston Court has held that Petitioner is bound by the contract and, upon the basis of such contract, has instructed the trial court to enter a decree stripping Petitioner of all right and title to the property.

Reasons For Granting the Writ

1. Insofar as the holding of the Houston Court of Civil Appeals is based upon the power of attorney executed by Petitioner, such holding is contrary to that of this Court in *Love v. Simm's Lessee*, 9 Wheat 515 6 L. Ed. 149. However, there is a far more fundamental reason why the writ should be granted herein.

2. It should go without saying that there can be no more flagrant example of taking property with-

out due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States than one in which property is taken from its owner by virtue of judicial enforcement of a contract which the owner neither executes, authorizes, nor ratifies. Such a situation is present in the case at bar. The lack of execution and of ratification are evident. The facts, and particularly the revocation of the power of attorney and the execution of the codicil, reveal a lack of authorization.

Authorization for the execution of the contract can be found only if one emulates the Houston Court of Civil Appeals and says that, despite the fact that Respondents knew that a trust existed and that Petitioner Laura Beth Moody was the bneficiary thereof, Respondents are privileged to ignore these facts and to blind themselves with respect to the terms, conditions, and limitations of the trust. To so hold is to sanction either cupidity or stupidity. If, with the knowledge which they possessed, Respondents failed to ascertain the conditions of the trust because of a fear of what they might learn, they were guilty of cupidity. If, knowing of the trust, they failed to ascertain its terms for any other reason, they were guilty of extreme stupidity. Respondents should not be permitted to profit from either their cupidity or their stupidity, yet the Houston Court has granted such permission.

The Houston Court based its action upon the twin Texas statutes referred to and quoted above. For

non-federal reasons of statutory construction, Petitioner has argued that the statutes, by their own terms, do not apply to this case. However, the Houston Court has held otherwise and has applied the statutes herein. The constitutionality of those statutes as applied to the instant situation is no greater than the result which their application wreaks. Such result is an unconstitutional deprivation of due process which necessarily renders unconstitutional the application of the statutes to the facts at bar.

Clearly, a great wrong has been done to Petitioner since by virtue of a contract which she neither executed, authorized, nor ratified, and which she in fact forbade, she has lost property whose sentimental value far outweighs its financial value.

Petitioner is aware that, except in criminal cases, this Court ordinarily does not exercise its jurisdiction to correct a wrong to a particular individual; and that, with the limitations upon its time and energy, the Court rightly concerns itself with problems of general importance. However, Petitioner submits that this case is of the latter character. If Petitioner can be deprived of valuable property bestowed upon her ancestors by the illustrious Sam Houston upon the basis of a contract such as that involved herein, so also may others throughout the nation be deprived of their property, be it valuable or not valuable, sentimentally, financially, or otherwise. The prevention of the infliction of wrongs upon others by *stare decisis* use of the decision of the

Houston Court of Civil Appeals herein eminently warrants action by this Honorable Court.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 6, 1958.

APPENDIX

A.

Original Opinion of the Houston Court of Civil Appeals

No. 13,091

In The Court of Civil Appeals

FOR THE
FIRST SUPREME JUDICIAL DISTRICT
OF TEXAS, AT HOUSTON

MORRIS KAGAN, ET AL.,
Appellants

vs.

ELIZABETH MOODY, ET AL.,
Appellees

Appeal from the 151st District Court
of Harris County

This suit was brought by appellants for specific performance of a contract for the sale of certain real estate. The contract was signed by Morris Kagan and Israel Rudy as buyers, and by Elizabeth Moody, a feme sole, individually and as attorney in fact and

trustee for Laura Beth Moody, a feme sole, as sellers. The chain of title into the appellants as buyers was, according to the findings of fact of the trial court, as follows:

> "(a) Quit-claim from Elizabeth Moody to Laura Beth Moody, dated February 1, 1950;
> "(b) Power of Attorney from Laura Beth Moody to Elizabeth Moody, dated February 3, 1950;
> "(c) Quit-claim (specifically incorporating the Trust herein) from Laura Beth Moody to Elizabeth Moody, trustee, dated April 17, 1953;
> "(d) Contract of sale from Elizabeth Moody, individually and as Attorney-in-fact and Trustee for Laura Beth Moody to M. Kagan and I. Rudy, dated June 29, 1954."

Appellants contend that under the Texas Trust Act they were not required to make any investigation as to the power of Elizabeth Moody, trustee, to execute the contract of sale, and that it was not necessary for the beneficiary of the trust, Laura Beth Moody, to join in the execution of a conveyance of the property in question. The deed in trust dated April 17, 1953, from Laura Beth Moody to Elizabeth Moody, Trustee, reads as follows:

STATE OFF TEXAS)
COUNTY OF HARRIS)

KNOW ALL MEN BY THESE PRESENTS:

THAT I, Laura Beth Moody, an unmarried woman over twenty-one years of age, of Harris County, Texas, for Ten Dollars ($10.00) cash and

other good and valuable considerations to me in hand paid by Mrs. Elizabeth Moody of Harris County, Texas, as Trustee, which considerations expressly include the full and proper performance by said Elizabeth Moody, Trustee, of all of the various duties and responsibilities defined in that certain creation of Trust and Trust Agreement of even date herewith, between said Laura Beth Moody, as Grantor, and Mrs. Elizabeth Moody, as Trustee, reference here being made to said Creation of Trust and Trust Agreement for all purposes, have granted and conveyed, and do hereby grant and convey, unto Mrs. Elizabeth Moody, Trustee, all of my property and estate whatsoever and wheresoever, REAL, personal and mixed, tangible and intangible, which I own or have power to use or dispose of, and in particular but not by way of limitation, all property, real, personal and mixed, located in the State of Texas, State of California and the State of Mississippi.

TO HAVE AND TO HOLD unto the said Elizabeth Moody, Trustee, in trust for the purpose and subject to all of the various terms and provisions specified in said Creation of Trust and Trust Agreement of even date herewith, to which reference has hereinabove been made, and I do hereby bind myself, my heirs and person representatives, to warrant and forever defend unto said Mrs. Elizabeth Moody, Trustee, and her successors in trust, subject to all valid and existing liens and encumbrances now of record and affecting such properties, the title to the properties hereinabove described against the claims of any and all persons whomsoever claiming or to claim the same or any part thereof.

IN TESTIMONY WHEREOF witness my hand at Houston, Texas, this 17 day of April, 1953.

/S/ LAURA BETH MOODY

(Acknowledgment)

The creation of trust and trust agreement referred to in said deed was executed the same day as the deed, but was never recorded. It gave Elizabeth Moody power to convey, encumber or otherwise dispose of the propety and to invest and reinvest the revenues therefrom. On the same day that the foregoing deed and trust agreement were executed, another instrument referred to as a "codicil," which was never recorded and never referred to in any instrument in the chain of title, was executed at the home of the Moodys some hours after the execution of the April 17, 1953, deed and trust agreement. This so-called codicil, which was typed on one sheet of paper and was not acknowledged, purported to be an amendment of the formal trust instrument and undertook to limit the trustee's power to convey real estate by requiring the joinder of Laura Beth Moody, or the trust officer of the Houston Bank & Trust Company, Ross Bennett, in transactions, "involving more than $5,000.00 and five years duration, such as leases, rentals, land improvements or sales . . . "

The first three instruments in the alleged chain of title of appellants were duly recorded in the office of the County Clerk of Montgomery County, Texas, prior to the execution of the contract of sale dated June 29, 1954, and the contract of sale was subsequently recorded in Montgomery County.

The trial court found that neither of the defendants, nor any other person, had ever told either of the appellants that Laura Beth Moody as beneficiary of a trust or in any other capacity had to consent to or join in the execution of any conveyance of the property in question in order for such conveyance

to be valid, and neither of the appellants had actual knowledge of any such requirement or agreement. Both Morris Kagan and Israel Rudy acted in good faith at all times material to the transaction in question, and neither of them was charged with wrongdoing or overreaching.

The trial court further found that the deed from Laura Beth Moody to Elizabeth Moody as trustee, dated April 17, 1953, expressly incorporates the trust agreement therein by specific reference, and that the contract of sale between Elizabeth Moody as trustee and appellants dated June 29, 1954, expressly states that Elizabeth Moody is "the trustee for Laura Beth Moody," and that the chain of title under which appellants claim was sufficient to put plaintiffs on inquiry and charge them with notice of the trust and its beneficiary, and of such facts as might have been disclosed by pursuing such inquiry with reasonable diligence.

The court rendered judgment in favor of appellees, denying specific performance and decreeing that the appellants take nothing, and that the contract of sale be cancelled and that the sum of $5,000.00 which had been deposited as earnest money by the appellants, as provided in the contract of sale, be released to them. Appellants in due course perfected their appeal, and the case is now before this Court for review.

There appears to be no dispute as to the facts in the case, and the only question before this Court is one of law to determine whether the joinder of Laura Beth Moody was required on the contract of sale in order to support a decree of specific performance binding upon her and Elizabeth Moody and validly vesting title in appellants.

Appellants' first point of error presents the proposition that under Article 7425a (7425b-8), V. A. T. S., Elizabeth Moody as trustee had authority to execute a valid deed conveying title to the property in questiion, or a valid contract of sale thereof, without the joinder of Laura Beth Moody in such deed or contract of sale.

Article 7425a and Article 7425b-8 are identical in language, and read as follows:

> "Where a trust is created, but is not contained or declared in the conveyance to the trustee, or when a conveyance or transfer is made to a trustee without disclosing the names of the beneficiary, or beneficiaries, the trustee shall be held to have the power to convey or transfer or encumber the title and whenever he shall execute and deliver a conveyance or transfer or encumbrance of such property, as trustee, such conveyance or transfer or encumbrance shall not thereafter be questioned by any one claiming as a beneficiary under such trust or by any one claiming by, through, or under an undiclosed beneficiary, provided that none of the trust property in the hands of said trustee shall be liable for personal obligations of said trustee. (Article 7425a, R.C.S. of Texas) Acts 1943, 48th Leg., p. 232, ch. 148, § 8."

It is apparent from reading this statute that the trustee is given power to convey or transfer or encumber the title to real estate, as trustee, when a trust is created but is not contained or declared in the conveyance to the trustee, or when a conveyance or transfer is made to a trustee without disclosing the names of the beneficiary, or beneficiaries.

Appellants contend that the deed in trust of April 17, 1953, from Laura Beth Moody to Elizabeth Moody, Trustee, does not disclose the name of the beneficiary, nor does it contain or declare the trust that is created. Appellees, on the other hand, contend that the trust is declared in such deed, or, in any event, that it is incorporated therein by reference.

The deed of April 17, 1953, from Laura Beth Moody to Elizabeth Moody, Trustee, and the deed of February 1, 1950, from Elizabeth Moody to Laura Beth Moody are, respectively, a general warranty deed and a special warranty deed, rather than quit-claim deeds, in that they do not purport to convey only the right, title and interest of the grantor in and to the subject property, but actually convey the property. The expression in the deed of February 1, 1950, "owned by me," referring to the property, and the pronoun "my" in the deed of April 17, 1953, as used in the clause, "all of my property and estate whatsoever and wheresoever, real, personal and mixed, tangible and intangible, which I own or have power to use or dispose of," are words of description. Instead of describing the property by metes and bounds, the grantor in each instance includes in the conveyance all the property that the grantor owns and not merely her right, title and interest in such property. See Cook vs. Smith, 107 Tex. 199, 174 S. W. 1094.

In the deed in trust, the property is conveyed to Mrs. Elizabeth Moody, Trustee. The first paragraph of the deed in part recites:

> "... for Ten Dollars ($10.00) cash and other good and valuable considerations to me in hand

> paid by Mrs. Elizabeth Moody of Harris County, Texas, as Trustee, which considerations expressly include the full and proper performance by said Elizabeth Moody, Trustees, of all of the various duties and responsibilities defined in that certain Creation of Trust and Trust Agreement of even date herewith, between said Laura Beth Moody, as Grantor, and Mrs. Elizabeth Moody, as Trustee, reference here being made to said Creation of Trust and Trust Agreement of all purposes . . . ."

In the habendum clause, it is provided, ". . . . unto the said Mrs. Elizabeth Moody, Trustee, in trust for the purposes and subject to all of the various terms and provisions specified in said Creation of Trust and Trust Agreement of even date herewith, to which reference has hereinabove been made . . . " The warranty is to "Mrs. Elizabeth Moody, Trustee, and her successors in trust, subject to all valid and existing liens and encumbrances now of record and affecting such properties . . . "

The above quoted provisions refer to the trust agreement between Laura Beth Moody and Elizabeth Moody, but the trust is not contained in the deed, nor is the name of the beneficiary recited therein. We are of the opinion that such references are not sufficient to declare the trust as that term is used in Article 7425b-8. The deed in trust refers to a trust that has been created, but it does no more than give the name of the trustee and refer in general language to performance by her of the various duties and responsibilities defined in the trust agreement but which are not defined in any recorded instrument. Article 7425b-8 does not state a reference to the trust is suf-

ficient or adequate to remove the transaction from out of the Texas Trust Act. The trust must be *contained or declared* in the conveyance to the trustee. In our opinion, the deed in trust must declare with certainty the essential terms and purposes of the trust, disclose the names of the beneficiary, or beneficiaries, and recite not only the subject and object of the trust, but also the functions and duties of the trustee. See 89 C. J. S., Sec. 42, pages 771-2, where it is stated:

"The declaration must contain sufficient words to create the trust, and it must embody all the essential elements of a trust. It must express the intention to create a trust . . . and state with certainty the terms, subject, persons, and object of the trust; and it has been stated that the trustee must be authorized and directed to perform certain duties and assume certain obligations."

We believe that a trust is not declared, within the meaning of Article 7425b-8, unless the language used is essentially that which is required for the declaration of a trust by a trustee.

Appellees contend, however, that at the time appellants and Mrs. Elizabeth Moody, individually and as trustee and attorney in fact for Laura Beth Moody, executed the contract of sale in question, appellants then were advised that Elizabeth Moody was trustee for Laura Beth Moody. It is doubtless true that at such time appellants learned that the said Elizabeth Moody was trustee for Laura Beth Moody, but they still did not know and were not advised of the terms of the trust. Certainly, the trust was not contained or declared in the contract of sale

between said parties. Actually, appellants knew no more than they did at the time they began to negotiate for the property, other than that the beneficiary in the trust agreement referred to in the deed of trust was, in fact, Laura Beth Moody, daughter of Mrs. Elizabeth Moody, the trustee.

Appellees strenuously contend that the appellants were put on notice of the recitals in the recorded chain of title and were therefore required to make an investigation and to determine the terms of the trust agreement. They have cited numerous cases to the effect that all persons are charged with notice of everything revealed by any document or instrument in the chain of title under which they claim as interest in land. We are in accord with the general propositions of law contained in the decisions cited by appellees. In the present case, however, we are dealing with the Texas Trust Act, enacted in 1943. Under this act, the prospective purchaser can purchase land from a trustee without making an investigation to determine the trustee's authority to sell, unless the deed in trust (1) contains or declares the trust, *and* (2) names the beneficiary. The deed in trust in the instant case does neither.

The case of Thlocco vs. Magnolia Petroleum Co., 141 Fed. 2d 934 (5th Cir. 1944), cert. den. 323 U. S. 785, 89 L. Ed. 627, correctly construes the Texas Trust Act and clearly shows that the purpose of the Act was to protect persons dealing with trustees and to relieve them of the necessity of investigating at their peril the duties and powers of the trustees

contained in some unrecorded instrument. The court stated:

> "The Statute governing dealings with trustees expressly provides that persons may deal with a trustee of this sort without inquiring as to the beneficiaries and without concern or responsibility as to the application of the proceeds. If this statute applied, the plaintiff was entitled to deal with the Trustee herein in respect of the sale of the lease, where he purported to be acting for himself, for Shunatona, his lessee, in full reliance upon his power to act, and with complete freedom of accountability to the beneficiary."

In the Thlocco case there was a recorded deed, which deed did not set forth the full trust, coupled with an unrecorded trust instrument. In the instant case, we have the same situation, to wit: a deed in trust duly recorded, and an unrecorded trust agreement thus facilitating the handling of the property by the trustee and eliminating the necessity of an investigation by the prospective purchaser of unrecorded instruments.

The second recital in the trust agreement between Elizabeth Moody and Laura Beth Moody reads as follows:

> "WHEREAS, it is the desire of the grantor and grantee in said Deed in Trust of even date herewith that the various conditions of the Trust Estate created thereby and the various powers, duties, authorities and responsibilities of the Trustee therein be fully and specifically pro-

vided in an instrument separate from said Deed in Trust, and that such Deed in Trust alone of the two instruments be filed for record in the various counties wherein such properties are located; and, . . ."

It would seem, therefore, that the appellees were intentionally seeking the advantages Article 7425a offers in enabling the trustee to deal freely with the property. However, subsequent to the execution of said contract of sale, the appellees for some reason, possibly increase in the value of the property, have refused to comply with the terms of the agreement on the ground that under the so-called codicil attached to the trust agreement some hours after its execution, the signature of the beneficiary was required.

Appellees have cited a number of cases, including the case of Woodall vs. Adams et al, 7 S. W. 2d 922 (C.C.A. Galveston, 1928), no writ history. This case involved a complicated fact situation in which there was a sale of property under a deed of trust, by the trustee in the deed of trust. The Texas Trust Act does not include sales under deeds of trust. Article 7425b-2. The sale under the deed of trust was to one Carrington. The word "trustee" was not added to his name. He was to buy in the property for Mrs. Adams, who owned the $10,300.00 note foreclosed, but instead took title in his own name. There was evidence that Woodall, to whom Carrington conveyed the property, knew of the trust and purchased the property under suspicious circumstances for $250.00, although the deed to him recited a consideration of $1,000.00. Mrs. Adams received nothing. Under

these facts, this Court, prior to the enactment of the Texas Trust Act, held that the act invoked [Art. 7425a, 1925] was enacted for the purpose only of protecting persons who might in good faith, and without notice or knowledge, for value, purchase land from one holding the apparent legal title, but who, in fact, hold such title in trust for an undisclosed principal. In the present case, there are no suspicious circumstances surrounding the transaction and no contention that appellants have not acted in utmost good faith.

Appellees contend, however, that the appellants were not bona fide purchasers, not only because claiming under alleged quit-claims, but because they had notice that Laura Beth Moody was the beneficiary of the trust at the time the contract of sale was entered into, and also because the down payment on the purchase money under the contract of sale has not been paid. It is true that the only money paid by appellants was the $5,000.00 earnest money, which was turned over to the title company to be held in escrow and to be applied upon the down payment of the purchase money in the event the title was found good and the transaction was consummated. In this connection it should be stated that the appellants have waived any and all defects in the title, and have performed fully and faithfully every requirement on their part, and have been and are now able, ready and willing to consummate the purchase of the property, but have been prevented by appellees from doing so.

The appellants have parted with the $5,000.00 earnest money, knowing that if they did not comply

with their part of the contract of sale such amount would be forfeited. They changed their position to that extent, and while technically they are not bona fide purchasers for value of the property since the purchase money has not been paid and the property has not been conveyed to them, they did act in good faith when they deposited the $5,000.00, and insofar as they are concerned the transaction was a bona fide one. They, having complied fully with the terms of the contract on their part, now insist that they are entitled to specific performance on the part of the appellees, as provided in said contract of sale. See Adams vs. Abbott et al (1952), 151 Tex. 601, 254 S. W. 2d 78.

Appellees also contend that since there has been no conveyance of the property in question to appellants, they are not bona fide purchasers thereof, and the Texas Trust Act is not applicable. It will be noted that Article 7425b-8 not only states that the trustee shall be held to have the power to convey or transfer the property subject to the trust, but expressly provides, "or encumber the title . . . such conveyance, or transfer or encumbrance shall not thereafter be questioned by anyone claiming as a beneficiary under such trust . . ."

It is our opinion that the Trust Act applies in the instant case for the reason that when the contract of sale was executed the trustee did encumber the property in question. Webster's New Collegiate Dictionary defines "encumber" as follows: "To place a burden upon; esp., to load with debts, or other legal claims." Black's Law Dictionary defines the term,

"To encumber land is to make it subject to a charge or liability."

The Texas Trust Act would be largely defeated if it were limited to conveyances of the property in question to bona fide purchasers. The word "encumber" in Article 7425b-8 must have some meaning and is broad enough to include a claim arising from the execution by appellants and appellees of the contract of sale in question.

In the case of Bauer vs. Bauer, 136 Neb. 329, 285 N. W. 565, (S. Ct. Nebr.), Alec Bauer held certain real estate in trust for his mother. He executed to a third party a farm lease containing the customary terms of that form of lease. The title was in Alec Bauer, the son, and there was nothing of record to show the name of the beneficiary and no declaration of the terms of the trust was recorded. The court held that the provisions of the Trust Act, Sec. 76-265, Comp. of St. 1929, applied, saying:

> "The primary purpose of this statute, of course, was to avoid title uncertainties and to facilitate conveyances, but there is nothing in its language or salutary object that requires a narrow construction, restricting its application to conveyances of the trustee's entire estate and holding that grants of lesser estates and interests are not within its operation."

There is nothing in the Texas Trust Act that would require that the Act be limited to conveyances, especially since Article 7425b-8 includes encumbrances on the title of the property.

In the case of Willys-Overland, Inc. vs. Blake et al (S. Ct. of Fla.), 121 So. 884, the lands involved in the appeal were conveyed by one M. P. Lawrence and wife to Earl B. Renwick, Trustee, with full power to sell, convey, transfer and encumber such real estate. There did not appear of record at the time of the recording of such conveyance a declaration of trust by the grantee so described declaring the purposes of the trust, if any, or that the real estate was held other than for the benefits of the grantee. The court held that the claimants of the benficial interests in the property possessed no rights that could be interposed against the right of a judgment creditor of the grantee, without any other notice of the beneficial owners' rights, to subject the property to sale and execution for the grantee's obligation.

Scott on Trusts, 2d Ed., Sec. 297.3, p. 2216, makes this pertinent comment with reference to trust statutes:

> "In order to make the land salable, statutes have been enacted in several states which provide that where the word 'trustee' is added to the name of the grantee in a deed of conveyance of land in which no beneficiaries are named, and the purposes of the trust are not set forth in the deed and no other instrument showing a declaration of trust is recorded, a purchaser of the land takes it free of any trust."

Bogert in his treatise on Trusts, 4 Bogert, Trusts and Trustees, Sec. 893, p. 537, states:

"Such statutes are of great aid to title searchers and title guaranty companies in clearing titles."

In view of the fact that at the time of executing the contract of sale in question the appellants were not advised of the terms and purposes of the trust and the same were not contained or declared in the deed in trust of April 17, 1953, or in the contract of sale, it is our conclusion that the appellants had the right to rely upon the powers of the trustee, Elizabeth Moody, to enter into a binding contract of sale of the property in question, and that it was not necessary for them to make any independent investigation to determine the nature and extent of her powers with respect thereto.

Appellants' second point is to the effect that under the language of Article 7425b-25, apart from Article 7425a (7425b-8), the so-called letter codicil which was not recorded or referred to in any recorded instrument and of which appellants had no notice, does not defeat appellants' right to specific performance of the contract of sale. They contend that the so-called codicil did not constitute an effective amendment of the trust even as between all of the then interested parties, and that if it was effective as between all interested parties, it did not defeat the rights of third parties, and in particular it did not bind the appellants since it was not incorporated by reference in the recorded deed in trust.

Article 7425b-22 provides as follows:

> "The trustor of any trust affected by this Act may, by provisions in the instrument creating the trust, or by an amendment of the trust *if the trustor reserved the power to amend the trust*, . . . alter or deny to his trustee any or all

of the privileges and powers conferred upon the trustee by this Act; . . ." (Emphasis ours)

There is nothing in the trust agreement which gives the beneficiary the right to revoke the trust in whole or in part, or to amend it. The trustee, Elizabeth Moody, is given the exclusive right to terminate the trust. The trust agreement refers to the "irrevocable terms" of the instrument creating the trust, and further provides that the trustee's powers are "qualified only by the provisions of this instrument," and further provides that the trust "cannot be modified except in accordance with the provisions" as set out in Article VI of such instrument. Article VI does not provide for any modification of the trust agreement during the life of Laura Beth Moody. Even though the so-called letter codicil was effective as between the trustee and the beneficiary, a point upon which we do not pass, it is the opinion of this Court that such codicil was not effective as between appellants and appellees in the present case.

A trustee is given broad powers under the Texas Trust Act in the absence of limiting provisions in the instrument creating the trust. See Article 7425b-25, V.A.T.S. The trust agreement in the instant case gives the trustee power to sell land and the statute gives the trustee the power to convey or transfer or encumber the title to the trust property, grant options, sell real or personal property at public auction or at private sale for cash or upon credit secured by liens upon such property.

We quote the following statement from Scott on Trusts:

> "Where the trust instrument gives the trustees a general power of sale, a purchaser of the trust property is protected although in a separate instrument the settlor imposed restrictions upon the trustee and the sale was made in violation of these restrictions, if the purchaser had no notice of the restrictions." 3 Scott on Trusts, 2d, Ed., Sec. 297.4, p. 2219.

See Huntoon vs. Southern Trust & Commerce Bank, 290 Pac. 86 (1930), cited by Scott.

In the present case, the court found that the appellants had no knowledge of the so-called codicil which undertook to limit the powers of the trustee, and there was no reference to such codicil in any of the recorded instruments. Moreover, at the time the deed in trust was executed, the so-called codicil was not in existence. The deed in trust referred to the trust agreement, but did not refer to any amendment or modification thereof. The trust agreement which was referred to gave the trustee the power of sale without any limitation. Even if it can be said that the appellants should have informed themselves concerning the terms of the trust agreement since it was referred to in the deed of trust, they would certainly not be required to inform themselves concerniing an unrecorded codicil executed subsequent to the deed in trust and in no manner referred to or incorporated in such deed in trust.

Appellants' third point of error is to the effect that Elizazbeth Moody as attorney in fact for Laura

Beth Moody, under the power of attorney dated February 3, 1950, had authority to execute a deed or contract of sale in behalf of Laura Beth Moody covering the land in question. The trial court found that the power of attorney of February 3, 1950, had not been expressly revoked by any instrument in writing. The court further found that such power of attorney had never been ratified after the date of the trust agreement, April 17, 1953, and that it and the trust agreement and codicil thereto were conflicting and were not consistent with each other. The court concluded in his conclusions of law that the trust agreement and codicil thereto were inconsistent with the power of attorney of February 3, 1950, and resulted in revocation of such power of attorney.

We cannot agree with the court's conclusion that the trust agreement and codicil thereto had the effect of revoking the power of attorney previously given Mrs. Elizabeth Moody by her daughter, Laura Beth Moody. Appellees contend that the power of attorney was revoked by the deed in trust, since by execution of such deed and the conveyance of the property to the mother as trustee, there was nothing left in Laura Beth Moody upon which the power of attorney could operate. They refer to the case of Chenault vs. Quisenberry, 56 S. W. 410, 21 Ky. L. 71, in which it was held that a power of attorney had been revoked by the owner's prior conveyance of the property. They also cite Donnan vs. Adams, C. C. A., 71 S. W. 580, writ denied, in which case it was held the sale of the land by the owner revoked the agency.

The case of Chenault vs. Quisenberry, supra, is distinguishable from the present case. In the Che-

nault case, relied upon by appellees, the owner of the property who had previously executed a power of attorney, conveyed the land to his agent as trustee and guardian of his son. Thus, he disposed of the property entirely and he had no further interest therein of any kind, so that a subsequent conveyance of the land by the agent under the power of attorney was void. In the instant case, the owner, Laura Beth Moody, conveyed the property in question to her mother, in trust. At the time the contract of sale was executed, appellants knew and could rely upon the fact that the beneficial ownership of the property was in Laura Beth Moody, and that she had an interest in the property upon which the power of attorney could operate, thus permitting Elizabeth Moody to execute the contract of sale not only as trustee but also as attorney in fact for her daughter.

Moreover, it seems quite evident that Elizabeth Moody continued to regard herself as attorney in fact for Laura Beth Moody and also as her trustee without regard to the value of the property sold. The record shows that subsequent to the date of the trust agreement and codicil she executed an earnest money contract individually and as attorney in fact and trustee for Laura Beth Moody, reciting a consideration in excess of $149,000.00. She also executed a letter agreement covering other property, signing the same, "Laura Beth Moody by Elizabeth Moody, trustee, attorney in fact." This transaction involved a lease for forty-five years at net rentals graduated over the lease term from $36,000.00 to $48,000.00 per annum. It appears, therefore, that the contract of

of sale in the present case is in keeping with previous transactions involving the trust property.

It is our conclusion that the contract of sale in question is binding upon the appellees and that specific performance of such contract would be in the interest of justice and fair dealing, in that the appellants have done everything required of them and are in no manner responsible for the refusal of appellees to proceed with closing the transaction. As far as the record indicates, the appellees have no valid reason for refusing to consummate the sale. We, therefore, hold that the contract of sale in question should be specifically enforced.

The judgement of the trial court is reversed and rendered and specific performance is granted the appellants of the contract of sale in question.

/s/ Ewing Werlein
Associate Justiice.

Judgment rendered and opinion filed December 19, 1957.

APPENDIX

B.

Opinion of the Houston Court of Civil Appeals on the Motion for Rehearing

We are of the opinion that this case was correctly decided in our opinion filed December 19, 1957. We have concluded on our own motion, however, that in view of the nature of the relief granted, it will be better procedure for this Court to reverse and remand the cause with instructions than to reverse and render the judgment, and our former opinion is reformed accordingly.

Therefore, this cause is reversed and remanded to the trial court with instructions to enter judgment in keeping with the opinion of this Court, in favor of appellants and against appellees, for specific performance in accordance with the terms of the contract of sale in question. Appellees' motions for rehearing are refused.

/s/ Ewing Werlein,
Associate Justice.

Order of December 19, 1957, reformed on Court's own motion by the foregoing order and opinion made and filed January 16, 1958, and Appellees' motions for rehearing refused on the latter date.

APPENDIX

C.

BE IT REMEMBERED:

That at the Term of the Honorable Court of Civil Appeals for the First Supreme Judicial District of the State of Texas, begun and holden at Houston on the first Monday of October, A. D., 1957, present Spurgeon E. Bell, Chief Justice, and Associate Justices Phil D. Woodruff and Ewing Werelin. In the cause

MORRIS KAGAN, ET AL.,
Appellants,

v.

ELIZABETH MOODY, ET AL.,
Appellees.

No. 13091

From Harris County, Tr. Ct.

No. 443,591

Opinion by Werlein, J.

The following judgment was rendered on January 16, 1958:

"On this day came on to be heard Appellee Laura Beth Moody's motion for rehearing and Appellee Elizabeth Moody's motion for rehear-

ing, and the same having been duly considered, because it is the opinion of this Court that both of such motions for rehearing are without merit, and should be refused, it is therefore ordered that both motions for rehearing be and the same hereby are refused.

"It is further ordered on the Court's own motion, that the judgment of this Court reversing the judgment of the Court below and rendering such judgment as shown have been rendered by the Court below, entered herein on December 19, 1957, of record in Minute Book 13, Page 598, be and the same hereby is reformed to hereinafter read as follows:

"This cause being an appeal from the judgment rendered and entered by the Court below on July 25, 1957, came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the Court below be reversed and the cause remanded with instructions to the Court below to render judgment in favor of plaintiffs and against the defendants, granting Appellants specific performance of the contract of sale in question. It is further ordered that the Appellees, Elizabeth Moody, a feme sole, individually and as trustee and attorney-in-fact for Laura Beth Moody, a feme sole, and Laura Beth Moody, a feme sole, pay all costs in this cause incurred, both in this court and in the court below. It is further ordered that this decision be certified below for observance."

APPENDIX

D.

No. A-6722 April 23, 1958

Elizabeth Moody, et al
vs.
Morris Kagan, et al.
} From Harris County, First District.

This day came on to be heard application of Elizabeth Moody and application of Laura Beth Moody for writs of error to the Court of Civil Appeals for the First District, and, after due consideration, the Court having determined that the applications present no error which requires a reversal of the judgment of the Court of Civil Appeals, it is ordered that the applications be, and hereby are, refused; that the applicants, Elizabeth Moody, a feme sole, individually and as Trustee and Attorney-in-Fact for Laura Beth Moody, a feme sole, and Laura Beth Moody, a feme sole, each pay all costs incurred on their respective applications.

No. A-6722 June 11, 1958

Elizabeth Moody, et al
vs.
Morris Kagan, et al.
} From Harris County, First District.

This day came on to be heard motion of Laura Beth Moody for rehearing of application for writ

of error, and, after due consideration, it is ordered that said motion be, and is hereby, overruled.

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the judgment on applications for writs of error and the order on motion for rehearing of application for writ of error of the Supreme Court of Texas, in the case numbered and styled as above, as the same appears of record in the minutes of said Court.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 2nd day of September, 1958.

/s/ Geo. H. Templin,
Clerk.

(SEAL)

FILE COPY

FILED
OCT 8 1958
JAMES R. BROWNING, Clerk

No. 345

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

LAURA BETH MOODY, *Petitioner*

v.

MORRIS KAGAN, ET AL, *Respondents*

Reply To Petition For A Writ Of Certiorari To The Court Of Civil Appeals For The First Supreme Judicial District Of Texas, At Houston

BRIEF FOR RESPONDENTS

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Reply To Petition For A Writ Of Certiorari To The Court Of Civil Appeals For The First Supreme Judicial District Of Texas, At Houston

BRIEF FOR RESPONDENTS

Respondents, MORRIS KAGAN and I. RUDY, pray that the Writ of Certiorari applied for by Petitioner, LAURA BETH MOODY, to review the judgment of the Court of Civil Appeals for the First Supreme Judicial District of Texas, at Houston, entered in the above entitled cause on January 16, 1958, be denied.

OPINIONS BELOW AND JURISDICTION

The citations of the opinions below and jurisdiction of this Court are accurately referred to in Petitioner's Brief. However, for the reason stated below, Respondents contend that their Court does not have jurisdiction of this cause.

FEDERAL QUESTION

As more fully stated below, Respondents contend that this case involves no federal question.

QUESTIONS PRESENTED

Petitioner is inaccurate in alleging in her statement of the question that Respondents "either knew or should have known that the Trustee with whom they contracted did not have the right to sell the property without the joinder of the owner of the equitable interest or her agent". The question of actual knowledge was resolved against Petitioner by the trial court's finding (Findings of Fact Nos. 21, 22 and 23, T-32 and 33). The question of whether Petitioner "should have known" is a legal question resolved against Petitioner by the judgment of the Texas courts below. In Respondents' view, the questions presented to this Court are as follows:

(1) Whether the due process clause of the Fourteenth Amendment is violated by the judgment of the Houston court granting specific performance of the contract executed by the trustee who held title under a deed which did not contain or declare the trust nor disclose the name of the beneficiary, based upon application of Articles 7425a and 7425b-8, *Vernon's Annotated Civil Statutes of Texas*.

(2) Whether the due process clause of the Fourteenth Amendment or other laws of the United States are violated by the judgment of the Houston court specifically

enforcing the contract on the theory that the power of attorney under which Elizabeth Moody purported to act had not been revoked.

STATUTES INVOLVED

There are two different statutes involved, each of one of which was an alternative basis for the Houston court's holding. One statute, Article 7425a, *Vernon's Annotated Texas Statutes*, (which is identical in language to Article 7425b-8) is set out in Petitioner's Brief. The other statute, Article 7425b-25, *Vernon's Annotated Texas Statutes*, is not mentioned by Petitioner but is involved in the case and reads as follows:

> "In the absence of contrary or limiting provisions in the instrument creating the trust . . . the trustee of an express trust is authorized: . . . (b) to grant options and to sell real or personal property at public auction or at private sale for cash, or upon credit secured by lien upon the property sold or upon such property or a part thereof and/or other property."

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct; however, the repeated references to the fact that the land was given to Petitioner's ancestors by "the illustrious Sam Houston" are irrelevant.

REASONS WHY CERTIORARI SHOULD BE DENIED

I.

Neither of the reasons assigned by Petitioner for granting the writ presents a substantial Federal question.

(a) The alleged conflict of the Houston court's construction of the power of attorney executed by Peti-

tioner with *Love vs. Simms' Lessee*, 9 Wheat, 515 (1824), does not present a Federal question.

(b) Neither the alleged unconstitutionality under the Due Process clause of the 14th Amendment of Article 7425a (7425b-8) or of the Houston court's construction of the power of attorney present a substantial Federal question.

II.

Even if Petitioner's assigned grounds present substantial Federal questions, neither of those grounds was raised in the State Court.

III.

Even if petitioner's assigned grounds present substantial questions, and even if they had been properly raised in the State Court, the decision of the Houston Court is supportable on an alternative ground of state law not challenged by Petitioner.

ARGUMENT

I.

Neither Of The Reasons Assigned By Petitioner For Granting The Writ Presents A Substantial Federal Question.

(a) The alleged conflict of the Houston court's construction of the power of attorney executed by Petitioner with Love vs. Simms' Lessee, 9 Wheat, 515 (1824), does not present a Federal question.

The basis on which Petitioner contends that the Houston court's holding with respect to the power of attorney

constitutes a reason for granting certiorari is not clear. The only Federal case cited by Petitioner is *Love v. Simms' Lessee*, 9 Wheat 515, (1824); however, there is much discussion of the Due Process clause which Petitioner may intend to refer to this aspect of the Houston court's holding. To the extent that Petitioner is relying on *Love v. Simms' Lessee, supra*, it would seem a sufficient reply merely to refer to *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938). *Love v. Simms' Lessee* was in the Federal courts apparently on diversity grounds and held that under the Tennessee registration statutes a subsequent conveyance to an attorney-in-fact revoked a prior power of attorney given to such party. Surely, the Texas courts are at liberty to reach a different result in construing their own laws; moreover, the Houston court distinguished the other cases cited by Petitioner as being in conflict with the Houston Court's decision, (see Opinion of Houston Court, page 34, Appendix A, Petitioner's Brief), and, accordingly, there is really no conflict.

(b) *Neither the alleged unconstitutionality under the Due Process clause of the 14th Amendment of Article 7425a (7425b-8) or of the Houston Court's construction of the power of attorney present a substantial Federal question.*

To the extent that Petitioner is asserting that due process is somehow contravened by the Houston court's holding, either with respect to the construction of the power of attorney or the construction of Article 7425a (7425b-8),—a contention which Petitioner does not support by citation of any authority—, it seems sufficient to quote the following from *Gryger v. Burke*, 334 U.S. 728 (1948):

"We are not at liberty to conjecture that the trial court acted under an interpretation of the state law different from that which we might adopt and then set up our own interpretation as a basis for declaring that due process has been denied. We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question."

II.

Even If Petitioner's Assigned Grounds Present Substantial Federal Questions, Neither Of Those Grounds Was Raised In The State Court.

Petitioner claims that an inexplicit contention that the courts of Texas have no right to deprive her of her property is sufficient to raise the issue of due process. In support thereof, she cites *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, and *Braniff Airways v. Nebraska State Board*, 347 U.S. 590. In the former case which involved a Petition for Habeas Corpus, the Court stated:

"The petition for habeas corpus, while asserting that the state statute was 'unconstitutional', contained no mention of any constitutional provision, state or Federal. The opinion delivered by the court of first instance was similarly indefinite. Up to that point it is left uncertain whether the claim of invalidity was grounded on some provision of the state Constitution, or on some provision of the Constitution of the United States, or on both. If this were all, there plainly would be no basis for a review in this court."

The Court went on to hold, however, that since the opinion of the Appellate Division showed on its face that it had passed on the Federal question, specifically the constitutionality of the statute under the due process clause of the Fourteenth Amendment, such opinion showed that the constitutional question had been raised and considered by the state court.

In the *Braniff* case the Petitioner had challenged the constitutionality of a taxing statute on the ground that it sought to impose a tax on property which had no "taxable situs" within the taxing state, and this Court held that the term "taxable situs" clearly pointed to the due process clause of the Fourteenth Amendment. The instant case is certainly distinguishable.

This Court has before it a record of materials designated by Petitioner, including Petitioner's Motion for Rehearing in the Houston Court of Civil Appeals (containing thirty-two separate assignments of error), Petitioner's Application for Writ of Error in the Texas Supreme Court, and for Motion for Rehearing in that court. Petitioner has been unable to point to any assignment of error or even any phrase or word which remotely suggests that she presented a federal question in the Texas courts. It is reasonable to presume that there is likewise no such question presented in other materials which Petitioner did not designate for inclusion in the record. This is not a case involving a question of whether a reference to the federal question is adequately explicit or sufficiently articulate. It is simply a case where Petitioner has obviously not had the slightest intention of litigating a federal question until filing the Petition for Certiorari in this Court.

While it is true that where the record does not show that either of the parties presented a federal question for decision to the State court, the Supreme Court will sometimes review the case if the opinion of the State Court shows that that Court ruled on the validity of a state statute under the laws and constitution of the United States, one will search the opinions and judgments of the Houston Court of Civil Appeals and the Texas Supreme Court (set out in the appendices of Petitioner's Brief) in vain for any hint of consideration of a federal question. Accordingly, this case is within the rule of *Wilson v. Cook*, 327 U.S. 474 (1945), rather than *Bryant v. Zimmerman*, *supra*.

III.

Even If Petitioner's Assigned Grounds Present Substantial Questions, And Even If They Had Been Properly Raised In The State Court, The Decision Of The Houston Court Is Supportable On An Alternative Ground Of State Law Not Challenged By Petitioner.

As may be readily observed from the opinion of the Houston Court set forth in Appendix A, pages 15-36 of Petitioner's Brief, the holding of the Houston Court was based on three alternative grounds: (a) Construction of Article 7425a (which is identical to Article 7425b-8), *Vernon's Annotated Civil Statutes of Texas*; (b) Construction of the power of attorney dated February 3, 1950, executed by Petitioner, and (c) Construction of Article 7425b-25, *Vernon's Annotated Civil Statutes of Texas*. Any one of such grounds, standing alone and in-

dependently of the other two grounds stated in the Houston court's opinion, would have supported the Houston court's judgment in favor of Respondents.

Petitioner at pages 11 et seq. of her Brief assigns two reasons for granting certiorari, namely: (1) That the Houston Court's holding with respect to the power of attorney conflicts with *Love v. Simms' Lessee*, supra, and (2) that Articles 7425a (and 7425b-8) are unconstitutional as applied. Even if Petitioner be correct in both these contentions, there remains one ground of the Houston Court's decision which Petitioner has not even mentioned, namely, the construction of Article 7425b-25. Petitioner has nowhere contended that the Houston Court's construction of that statute was unconstitutional as applied, nor does Petitioner mention that statute in the section of her Brief entitled "Statutes Involved", or anywhere else. Petitioner is completely silent on this basis of the Houston Court's holding. This omission leaves unchallenged one of the 'three alternative' grounds of the Houston Court's opinion, and for this reason alone the petition should be denied. As Chief Justice Stone has stated "we have repeatedly held that where the judgment of a State court rests in part on a non-federal ground adequate to support it, this Court will not consider the correctness of the decision which the State court also made of a federal question otherwise reviewable here". *Flournoy v. Wiener*, 321 U.S. 253 at page 262 (1944). This established principle has been applied from an early date through recent cases: *Mills v. Brown*, 16 Pet. 525 (1842); *Murdock v. Memphis*, 20 Wall. 590 (1874); *Black v. Cutters Laboratory*, 351 U.S. 292 (1955). It should be noted that this is not a case where the Houston Court's decision

"might" have rested on adequate non-federal grounds. Cf. *Minnesota v. National Tea Co.*, 309 U.S. 551-559 (1940). The Houston Court's opinion was abundantly clear in predicating its decision on this alternative ground. See pages 31, 32, Appendix A, Petitioner's Brief.

CONCLUSION

For the reasons stated above, the petition for the Writ of Certiorari should be denied.

Respectfully submitted,

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Certificate of Service

I hereby certify that I served copies of the foregoing brief on the attorneys for Petitioner, Hon. Cam Harrell, Conroe, Texas and Hon. R. Dean Moorhead, Austin, Texas by depositing properly addressed copies in the U. S. mail, first class postage prepaid, this 7th day of October, 1958 and that neither of their offices is more than 500 miles from Houston, Texas.

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